United Nations

AT

Administr[illegible] Tribunal

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ENGLISH
ORIGINAL: FRENCH

ADMINISTRATIVE TRIBUNAL

Judgement No. 728

Case No. 809: TREMPE

Against: The Secretary General of the International Civil Aviation Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Hubert Thierry; Mr. Mayer Gabay;

Whereas, on 19 August 1994, Gerald Rene Trempe, a former staff member of the International Civil Aviation Organization (hereinafter referred to as ICAO), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 27 September 1994, the Applicant, after making the necessary corrections, again filed an application, requesting the Tribunal:

"To order:

(1) The rescinding of the Secretary General decision [not to renew his appointment beyond 31 December 1992];

(2) [His] reinstatement as a staff member of the International Civil Aviation Organization;

(3) Payment of [his] salary and allowances with interest covering the period from 1st January 1993 up to the end of this litigation during which time [he has] been compelled to remain unemployed;

(4) Payment to UN Joint Staff Pension Fund by ICAO on [his] behalf of the appropriate contributions with interest covering the period 1st January 1993 till the end of this litigation;

(5) Exemplary damages for moral and material injury resulting from misuse of administrative practices and the time limits setting as a trap and a means to catch [him] out, in the range of $65,000 to $95,000;

(6) Appropriate compensation to cover the cost of filing this appeal, in the range of $1,000 to $1,500.

[or]

(i) Payment of the amount equivalent to three years net base salary;

(ii) Exemplary damages for moral and material injury resulting from misuse of administrative practices and the time limits setting as a trap and a means to catch [him] out, in the range of $65,000 to $95,000;

(iii) Appropriate compensation to cover the cost of filing this appeal, in the range of $1,000 to $1,500."

Whereas the Respondent filed his answer on 9 March 1995;

Whereas the Applicant filed written observations on 27 July 1995;

Whereas, on 27 October 1995, the Applicant submitted additional observations and documents;

Whereas, on 29 October and 11 November 1995, the Applicant submitted further documents;

Whereas the facts in the case are as follows:

The Applicant entered the service of ICAO on 27 June 1990 as a Distribution Clerk

at the G-3 level, on a temporary appointment expiring on 12 October 1990. His appointment was extended successively until 31 December 1990, 31 January 1991, 28 February 1991 and 31 December 1991. With effect from 1 January 1992, the Applicant's appointment was extended for one year. He separated from service on 31 December 1992, upon the expiration of his appointment.

In a letter dated 6 November 1992, the Secretary General informed the Applicant: "[Y]our present temporary appointment dated 30 December 1991 will expire on 31 December 1992. The Organization does not intend to offer you a further appointment after that date."

On 6 January 1993, ICAO issued a vacancy notice for recruitment of a Distribution Clerk at the G-3 level. On 13 January 1993, the Applicant applied for the post. On 2 March 1993, the Chief of the Recruitment and Placement Section informed the Applicant that he had not been selected for the post.

In the meantime, on 20 January 1993, the Applicant requested the Secretary General to review the decision, conveyed to him on 6 November 1992, not to renew his appointment. He noted that, on 13 November 1992, he had met with the Chief of the Personnel Branch, who told him that the number of General Service staff had to be reduced. He added that he was then surprised to see that a temporary Distribution Clerk had apparently replaced him and that a vacancy notice had been issued for the post. In a reply dated 27 January 1993, the Secretary General advised the Applicant that "[t]he very nature of a temporary appointment is that it does not carry any expectancy of renewal and expires automatically without further notice". He stated that, at the time of the meeting on 13 November 1992, "it was intended to keep the post vacant", but that subsequently "it was decided to fill the post again" and that another person was recruited "because the supervisors did not express an interest to rehire you". He further noted that although the terms of the Applicant's temporary appointment excluded the appeals procedure set forth in the Staff Regulations and Rules, he would have been prepared to consider a request for appeal if it had been submitted within the prescribed time-limit for one month from notification of the decision. Since the Applicant had not met the deadline, he

was "not prepared to consider [his] request".

On 9 February 1993, the Applicant requested the Secretary General's permission to appeal directly to the Administrative Tribunal. On 18 February 1993, the Secretary General rejected this request. On 15 February 1993, the Applicant lodged an appeal with the Advisory Joint Appeals Board, requesting a waiver of the applicable time-limits.

On 27 April 1994, the Chairman of the Board made the following recommendation to the Secretary General:

> "By letter dated **6 November 1992**, [the Applicant], who had a temporary contract, was informed that his contract which was due to expire on 31 December 1992, would not be renewed. Staff rule 111.1.5 provides that a staff member seeking to appeal must first address a letter to the Secretary General requesting that the decision to be appealed against be reviewed. This letter must be sent within one month of the time the staff member received notification of the decision in writing. In fact, [the Applicant] sought a review of the decision on **20 January 1993** only. Under staff rule 111.1.7, a staff member who fails to observe this time limit loses the right to appeal, unless the delay is waived under rule 111.1.8 which reads:
>
> > 'The staff member may request that in view of exceptional circumstances, the delay in filing the appeal be waived. The Board shall examine such request as a preliminary issue and make its recommendations thereon to the Secretary General for his decision.'
>
> ...
>
> On 21 April 1994, the Board carefully reviewed all the relevant facts and circumstances associated with the filing of the appeal including the fact that [the Applicant] claims that he had not been aware that his post was being filled, having been informed by C/PER on 13 November 1992 that the post would in fact not be filled, and **unanimously** recommends that you exercise your discretionary power and waive the time limits in this case so as to enable [the Applicant] to proceed with his appeal."

On 30 May 1994, the Chairman of the Board advised the Applicant as follows:

"I wish to refer to your letter dated 15 February 1993 by which you sought to appeal against the decision of the Secretary General not to renew your contract of appointment and in which you requested a waiver of the applicable time limits, as well as to the subsequent correspondence between the Board and yourself in this regard.

By IOM dated 27 April 1994, the Board unanimously recommended to the Secretary General that he exercise his discretionary power and agree to waive the time limits to enable you to proceed with the appeal. I regret to inform you that the Board was advised by the Secretary General on 13 May 1994 that he did not agree with the Board's recommendation. Consequently, your appeal is not receivable by the Board."

On 27 September 1994, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. During the 30-day period for appeal following the decision not to renew his appointment, the Applicant believed his post had been abolished, and was not aware that he had grounds for appeal. Because he was misled by the Respondent, the time-limit should not be applied to him.

2. The Respondent has acted in bad faith and, by failing to follow a reasonable procedure, has displayed arbitrariness.

Whereas the Respondent's principal contentions are:

1. The application is not receivable as it does not comply with the requirements of article 7 of the Statute of the Tribunal.

2. The Applicant failed to observe the time-limit for appeals, and the Respondent acted within his discretionary powers when he decided that there were no exceptional circumstances justifying a waiver of the time-limit.

The Tribunal, having deliberated from 1 to 21 November 1995, now pronounces the following judgement:

I. Having received notification, on 6 November 1992, that his appointment would be expiring at the end of the year and that the Administration did not intend to renew it, the Applicant addressed a letter to the Secretary General, on 20 January 1993, requesting that the decision be reviewed. It has not been denied that the Applicant's request was late; it was submitted after the one-month time-limit laid down in ICAO staff rule 111.1.5, after which the right to appeal is lost.

II. In the course of a meeting on 13 November 1992, the Chief of the Personnel Branch of ICAO informed the Applicant that the reason why his appointment was not being renewed was that his post was being abolished as part of a reduction in staff. Early in 1993, however, the Applicant noted that that was not the case and that someone had been appointed to replace him.

III. Having received an appeal from the Applicant dated 15 February 1993, the Advisory Joint Appeals Board requested the Secretary General to exercise his power, under staff rule 111.1.8, to waive the time-limit laid down in staff rule 111.1.7, in view of the "exceptional circumstances". The Secretary-General refused, however, to follow the Board's recommendation to waive the time-limit. Consequently, the Board was not able to consider the Applicant's case.

IV. The Applicant requests the Tribunal to rescind the Secretary General's decision not to waive the time-limit. In the opinion of the Tribunal, the Secretary General enjoys discretionary power to determine whether "exceptional circumstances" exist that would justify a waiver of the time-limit laid down in staff rule 111.1.7. In earlier rulings, the Tribunal has

held (Judgement No. 527, *Han* (1992)) that only a decision by the Secretary General tainted by errors of law or fact, arbitrariness or discrimination would prompt the Tribunal to censure the decision; moreover, it would be for the Applicant to show that the decision was tainted by one of those defects. That has not happened in this case.

V. If the Chief of the Personnel Branch - and this has not been confirmed - gave inaccurate information to the Applicant, that was wrong. Nevertheless, in the circumstances, the Secretary General was within his rights in concluding that there was no justification for waiving the time-limit.

VI. For the foregoing reasons, the Tribunal rejects the application.

(Signatures)

Jerome ACKERMAN
President

Hubert THIERRY
Member

Mayer GABAY
Member

New York, 21 November 1995

R. Maria VICIEN-MILBURN
Executive Secretary